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No. 177

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In the

Supreme Court of the United States

October Term, 1966

FRANK J. FABIAN, JOSEPH E. FABIAN
AND ROBERT P. SZALAY,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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Frank J. Fabian, Joseph E. Fabian and Robert P. Szalay, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled cause on March 28, 1966.

OPINIONS BELOW

There was no formal opinion of the District Court.

The opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this Petition.

JURISDICTION

(1) This Court's jurisdiction is invoked under 28 U. S. Code § 1254 (1), 28 U. S. Code § 1651, 28 U. S. Code § 2106, and Rule 37 (b) of the Federal Rules of Criminal Procedure. Supreme Court Rule 19(b).

(2) The judgment of the Court of Appeals was entered March 28, 1966, and an order staying the mandate of that Court was entered April 18, 1966.

(3) The Supreme Court, through Mr. Justice White, by an order entered April 22, 1966, granted your petitioners until and including May 27, 1966, to file this petition.

QUESTIONS PRESENTED

Petitioners invoke the Court's supervisory powers to determine:

1. (a) Whether the indictment of a Grand Jury convened without notice to the parties accused is a violation of the rights of the accused under the provisions of the Fifth and Sixth Amendments of the Constitution;

(b) Whether the investigations and deliberations of a grand jury are an integral part of the prosecution of parties accused of crime;

(c) Whether parties accused of crime have a right to appear before the grand jury personally and by counsel, for the purpose of rebutting probable cause as established by the Government;

(d) Whether the provisions of the sixth amendment apply to a person being investigated by a grand jury, only in a negative sense, to wit; silence, or whether the sixth amendment gives one accused of crime, the rights to counsel, to be informed of the charges against him, to confront his accusers, to introduce evidence and to examine the government's evidence?

The Petitioners point out that the above questions have not been ruled on by this Court, and they are of such national importance, that this court should review this question.

2. Whether the trial court abused its discretion in failing to dismiss the petit jury panel when the following was called to his attention:

A statement was made by one of the members of the panel, in front of the other members of the panel, which statement is as follows:

> "I was called for jury duty in a case involving mail fraud many years ago and it was during the World Series. We went into the jury room to deliberate and I says 'let's find him guilty and go watch the World Series,' which we did."

The petitioner submits that this is a question of serious national concern and further that the Court of Appeals rendered a decision on this question, in conflict with the applicable rulings of this Court.

3. (a) Whether the statements allegedly made by salesmen of a corporation out of the presence of the petitioners, officers of the corporation, should be admitted in evidence without a foundation being laid establishing that the petitioners authorized the statements, ratified the statements or acquiesed in the statements?

(b) Whether the rule of the several courts of appeals which, authorizes the admission of statements described in 3 (a) above, without foundation, as an exception to the hearsay rule, is such a departure from accepted judicial procedure, as to deprive the defendants below, petitioners here of procedural due process of law.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment of the Constitution of the United States provides in pertinent part as follows:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment of a grand jury . . . nor be deprived of life, liberty or property, without due process of law . . ."

The Sixth Amendment of the Constitution of the United States provides in pertinent part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Section 18 U. S. Code 1341 states in pertinent part:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining

money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any postoffice or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing or knowingly causes to be delivered by mail according to the direction thereon, or at a place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing shall be fined not more than $1,000.00 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

In the summer of 1962 petitioner Frank J. Fabian, a 38 year old high school graduate, and his brother, petitioner Joseph E. Fabian, a 27 year old college student, sold stereo sets for Concerto, Inc., in Omaha, Nebraska, on a part-time basis. Concerto used the referral system, described below, and the Fabians worked for commissions, usually receiving $50.00 per set. While vacationing in Omaha that summer, petitioner, Robert P. Szalay, a 23 year old nephew of the Fabians, accompanied them on sales demonstrations. During that period the Fabians, because of the apparent success of Concerto, Inc., discussed the possibility of forming their own business, and their nephew was present during some discussions. Robert Szalay returned to his home in Dearborn, Michigan at the end of the summer, but communications were maintained. In the early fall of 1962 the Fabians decided to set up a sales program in another city similar to that used by Concerto in Omaha, and Robert P. Szalay decided to join

the venture, contributing some capital. Additional funds were advanced by Joseph E. Fabian and a brother not involved in the case.

Petitioners then established Concordia, Inc., as a Nebraska corporation. Frank was president; Joseph, vice-president; and Robert was secretary-treasurer. On October 1, 1962, the corporation was authorized to do business in the State of Iowa. A sales tax permit was secured on October 28, 1962, and petitioners posted a cash bond of $500.00. Office space was obtained in Des Moines under a one year lease, commencing September 22, 1962, and bank accounts in the name of Concordia, Inc., were opened with a Des Moines bank. Membership in the Credit Bureau of Des Moines was established in October of 1962. Arrangements were made to obtain stereo sets from Muntz T.V., Inc. of Illinois at a cost to the petitioners ranging from $98.00 to $149.00, depending on the model and the finish. However, most of the 65 sets purchased from Muntz were in the wholesale price range of $98.00 to $103.00, plus freight. Petitioners contacted several finance companies and Consumers Finance Corporation finally agreed to purchase the Concordia sales contracts.

The method of marketing the sets in Des Moines was, in essence, a carbon copy of the Concerto sales plan in Omaha. Each stereo purchaser would receive an "Owner's Dividend Certificate" which provided that $15.00 would be paid for the name of each prospective customer (subject to credit qualifications), who agreed to a sales demonstration, regardless of whether a sale resulted. In addition, the prospective customer would receive $5.00 merely for listening to the sales presentation, which was not con-

tingent upon the purchase of a set. Customers were informed that they could earn a set by referring twenty-six names, which could be submitted over a two year period. Customers were advised that the sets would later be sold through a retail outlet which petitioners planned to establish. The petitioners were in fact looking for a retail store during the time.

The stereos were generally sold on an installment contract for $389.95, plus interest and carrying charges. These contracts were assigned to Consumer Finance Corporation, which deducted a discount, and paid the balance to Concordia. Purchasers were to make payments directly to the finance company.

Initially the petitioners demonstrated the stereos, but they soon hired several salesmen, a number of whom were stereo purchasers who worked only part time. Among the salesmen was a Don Knight, who had previously sold for Concerto in Omaha during the same interval that the Fabians were connected with the organization. Subsequent thereto, but before going to Des Moines, he took over a referral program involving Muntz stereos in Lincoln, Nebraska. That business was unable to honor the referrals and in mid-November, 1962, Knight came to Des Moines and was hired as a salesman. The petitioners had no idea that Concerto was having financial difficulties until after Knight came to join their sales force well after the time when petitioners formed the business.

About the same time as Knight came to Des Moines, the Muntz T. V. Company informed the petitioners that they would no longer sell stereos to Concordia, because they got adverse publicity from the similar program in

Lincoln. The last Muntz set was sold to petitioners on November 20, 1962. Thereafter, Concordia obtained the same Muntz model from other sources, the majority of which were at a wholesale price higher than the Muntz price.

The referral program is based in part on the probability that most people will only come up with between 1 and 10 appointments an average of 5 per person. Some of course will provide many names but these can be met because the others fail to take full advantage of the program. The program is not based on the proposition that at some point some customers will not be paid, but rather on statistical probabilities, of the fact that most purchasers will send only a few names and then not be bothered any further.

The petitioners had their chances for success based on the following:

A.	Selling price (per set)		$ 389.95
B.	Sell one out of five calls		
C.	Cost of set	$108.00	
D.	5 Referrals (5 @ $15.00)	75.00	
E.	5 Calls (5 @ $5.00)	25.00	
F.	Finance Co. Holdback	17.50	
	Salesmen's Commission	50.00	
	Loss on Trade In Merchandise	20.00	
			$ 295.20
	Gross Profit (per set)		$ 94.45
	20 Sales per Month		$1,889.00
	(Less office expense, salary, etc.)		

The probabilities did not work as anticipated and the petitioners began having difficulties meeting referrals.

In December, 1962, Concordia began receiving complaints that appointments were not kept with the referrals. Complaints were also received that the $15.00 payments were not being paid. In addition to complaints directed to Concordia, complaints were lodged with the Better Business Bureau.

The petitioners did everything within their power to meet the referrals. They spent almost all their income in trying to honor the referrals, and Joseph E. Fabian, even took a personal loan which he turned over to the company to pay the referrals but to no avail. Finally they were out of money and credit and on February 25, 1963 they had to close their doors and go out of business.

More than a year later the Concordia Purchasers with the assistance of a local radio station banded together for the purpose of commencing a civil action against the petitioners and the Consumers Finance Company. In the process of their meetings it was decided that the U. S. Attorney should be informed of the situation. Obviously they felt that their civil litigation would be enhanced by a criminal prosecution. They worked so closely with the District Attorney that he even called the purchaser's attorney to testify however this was not permitted.

A grand jury was convened, without notification of any kind to the petitioners or any of them. The grand jury met, and deliberated and returned an indictment against each of the petitioners on June 17, 1964.

The petitioners were arrested shortly after the return of the indictment. The arrest was the first notice which

any of your petitioners received of the charges against them.

The trial was had, commencing October 5, 1964 until October 13, 1964. The jury, in approximately 1 hour found the petitioners and each of them, guilty on all counts submitted to them (Counts 2, 3 and 4 excluded).

The petitioners' motion for new trial was denied.

The trial Court entered judgment on the verdict and sentenced the petitioners Frank J. and Joseph E. Fabian to three years imprisonment on all counts — except count 19 — the sentences to run concurrently. However it was recommended that these petitioners be eligible for parole after six months. As to Count 19, they were placed on probation for three years, said sentence to run consecutively with that imposed on the other counts. Petitioner Robert P. Szalay was given a suspended sentence under the Youth Correction Act and placed on probation for three years. A condition of probation for each appellant was payment of one-third of the costs.

Prior to the selection of a jury, one of the members of the panel made the following statement in the presence of the petitioners and in the presence of the rest of the panel:

> "I was called for jury duty in a case involving mail fraud many years ago and it was during the World Series. We went into the jury room to deliberate and I says 'let's find him guilty and go watch the World Series' which we did."

The above was called to the trial Court's attention but he failed to dismiss the panel or to interrogate the panel as to possible prejudice.

During the course of the trial the Government introduced 57 witnesses, 44 of whom testified to statements made to them by Concordia Salesmen, out of the presence of the petitioners. None of these salesmen were co-defendants. The petitioners' counsel objected because of the hearsay nature of said statements, and because of the lack of foundation for the statements showing that the petitioners knew of the statements, authorized, ratified or acquiesed in said statements. The trial Court overruled the petitioners' objection and allowed all 44 to testify and instructed the jury to disregard their testimony if a scheme to defraud was not established by independent evidence.

The Court gave the jury Instruction Number 11 concerning said heresay. Instruction 11 is set out in Appendix E.

The judgment of the District Court was appealed to the United States Court of Appeals for the Eighth Circuit which affirmed the trial Court on all matters. The Opinion of the United States Court of Appeals is included herein in Appendix A.

REASONS FOR GRANTING WRIT

I.

The petitioner urges this Court to exercise its supervisory powers over the lower courts to strike down a practice, of many years standing, that of convening grand juries without notice to the parties being accused before the grand jury, and without the accused being

given an opportunity to be heard at this the earliest stage of the prosecution.

The activities of a grand jury may be investigatory in name, but I submit, such activities are accusatory in fact. These activities are in truth and in fact, the beginning steps of the prosecution of one accused of a crime.

The Fifth Amendment of the Constitution which provides as pertinent:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . nor be deprived of life, liberty or property, without due process of law . . .

must be construed in conjunction with the Sixth Amendment which states as pertinent:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fifth and Sixth Amendments as construed together extend the rights provided for by the Sixth Amendment, to the grand jury processes provided for in the Fifth Amendment, to the end that one accused before a grand jury may appear before the said grand jury, as a matter of right, to rebut probable cause, if any there be. This right must also include the right of one so accused to appear with counsel for his defense, to not only advise, but to examine witnesses and call witnesses and to take whatever affirmative actions which the cir-

cumstances warrant to rebut probable cause if any there be.

The indictment of a grand jury convened, without any notice to the parties accused, is null and void as violating an accused's rights under the Fifth and Sixth Amendments, and any proceedings thereunder should be also null and void. Such an indictment should be construed to be void ab initio, so that objection can be raised at any time and also, so that a judgment rendered on such an indictment can be collaterally attacked.

The doctrines of *Gideon v. Wainright* (1963), 372 U. S. 335, 83 S. Ct. 792 9 L. ed. 2d 799, 93 A. L. R. 2d 733, which was expanded upon by *Massiah v. U. S.* (1964), 377 U. S. 201, 84 S. Ct. 1199, 12 L. ed. 2d 246 and *Escobedo v. Illinois,* 378 U. S. 478, 12 L. ed. 2d 977, 84 S. Ct. 1758 should be further expanded to include the right to appear before a grand jury investigating one accused, so that the dictum of *Powell v. Alabama,* 287 U. S. 45, 77 L. ed. 158, 53 S. Ct. 55 that the accused "requires the guiding hand of counsel at every step in the proceeding against him" can be given effect.

It is a fallacy that the activities of a grand jury are not part and parcel of a prosecution. A doctrine which would grant an accused counsel at the police station (*Escobedo*) and not at the grand jury room is inconsistent and arbitrary and cannot be the meaning of the fifth and sixth amendments.

This right should not be limited only to the advice of counsel but should include the right to confront the

accusers, and to have the accuser subjected to examination by the accused or his counsel.

The government has the right to call or recommend the calling of witnesses and to examine them. To deny the accused a comparable right is grossly unjust.

Notwithstanding the acceptance of the rule in the past, that a person does not have a right to appear before a grand jury, *Duke v. U. S.*, C. C. A. 4th 90 F. 2d 840, 112 A. L. R. 317, Writ of Certiorari denied 302 U. S. 685, 82 L. ed. 528, 58 S. Ct. 33 this court should follow its own well reasoned decisions in, *Gideon v. Wainwright*, supra, *Massiah v. U. S.*, supra and *Escobedo v. Illinois*, supra, to their logical conclusion to give real effect to the Fifth and Sixth Amendments to the Constitution.

No harm can be suffered on the part of the government or society because of a rul[illegible]n as your petitioners advocate, recognizing a right to be heard.

In the instant case, the grand jury was convened, as a result of a complaint of persons commencing civil litigation against the petitioner and their corporation. This grand jury was convened, without notice of any kind to the petitioners and an indictment was returned which resulted in the petitioners being arrested.

The arrest of the petitioners was the first notice which they received of the existence of charges against them.

The Fifth Amendment provides that no person shall ". . . be deprived of life, liberty or property without the due process of law . . .!

Can a secret proceeding such as in the instant case be in accordance with the "due process of law"?

Your petitioners urge the Court to rule that it is not. Such secret proceedings would be more in line with the "rack" and "screw" methods of the "inquistion" or the tyranny of a police state. There is no room in our modern world for such sneaky and secret "star chamber" meetings of a grand jury.

The time has come, no, it is past due, in this modern day when everything is slanted heavily in favor of the prosecution and against those accused of crime, that the rights of the accused be recognized and protected.

Your petitioners respectfully request that the Court expand upon the foundation laid in its historic decisions, in *Gideon v. Wainright,* supra, *Massiah v. U. S.,* supra, and *Escobedo v. Illinois,* supra, to secure to those accused, such as your petitioners, the right to appear before the grand jury inquiring into their activities, so that they can rebut probable cause, if any, at this earliest stage of the prosecution. It is further urged that the practice of convening grand juries in secret, without notice to those accused, be abolished, and indictments returned in such proceedings be held, to be void ab initio.

A person accused of crime can ask for no more than a chance to be heard and represented at the earliest stage of prosecution, and this Court must grant them no less.

I further submit, that although your petitioners are sure they were prejudiced by the secret grand jury method used in their case, but are unable to point out specific instances of prejudice, however, under the rules of this Court in *Shotwell Mfg. Co. v. U. S.*, 371 U. S. 341, 9 L. ed. 2d 357, 83 S. Ct. 448 (1963) and *Marshall v. U. S.*, 360 U. S. 310, 3 L. ed. 2d 1250, 79 S. Ct. 1171 (1959), your petitioners feel that a specific showing of prejudice is unnecessary in face of the grave violation of your petitioners' rights under the Fifth and Sixth Amendments.

II.

In the instant case, we are faced with a situation somewhat similar to situations which this Court handled in *Shotwell Mfg. Co. v. U. S.*, supra, and *Marshall v. U. S.*, supra.

In the instant case, one of the jury panel, prior to being called, made, in essence, the following statement in front of the three petitioners and to the balance of the panel:

> "I was called for jury duty in a case involving mail fraud many years ago and it was during the World Series. We went into the jury room to deliberate and I says 'let's find him guilty and go watch the World Series' which we did."

I call this Court's attention to the fact that the World Series was on when the petitioners stood trial.

Immediately the above quote was called to the attention of the trial judge and the trial judge struck the juror who made the statement from the panel for cause but failed to interrogate the jurors as to any possible

prejudice which this statement may have had on them.

The Court of Appeals ruled on page 7 of its opinion, see Appendix A, p. 29, that "jury prejudice cannot be presumed, and appellants have the burden of showing its existence."

I submit that the ruling of the Court of Appeals is in direct conflict with this Court's ruling in *Marshall v. U. S.*, supra.

In the *Marshall* case the trial court went further than the trial court in the instant case. In *Marshall* the trial court interrogated each of the jurors and determined that no prejudice existed. Nevertheless this Court reversed and remanded, even though no prejudice was shown.

This Court held that where there is a serious question of possible prejudice, the Court should exercise its supervisory powers over the Federal Judicial System, and reverse.

This Court ruled in *Marshall* that it is not necessary for the petitioners to show actual prejudice.

In the instant case, there is a serious question of possible jury prejudice, and the decision of the Court of Appeals is in direct conflict with the applicable decisions of this Court.

This Court should exercise its supervisory powers over the lower courts to rectify the violation of your petitioners' right to "trial by an impartial jury" as guaranteed in the Sixth Amendment of the Constitution of the United States.

III.

Your petitioners urge the Court to address itself to a question of evidence which has not been decided by this Court but which should be for the protection of your petitioners and others finding themselves in a similar situation. This question concerns the practice in Courts of the Eighth Circuit, in cases under 18 U. S. Code 1341, of admitting, hearsay statements of salesmen or agents of the accused parties into evidence, without showing authorization, ratification or even knowledge of the statements.

These rules are matters of convenience to the prosecution and as such should be carefully examined.

The Court of Appeals in its opinion at pages 7 to 10 see Appendix A, pp. 29-32, treated this issue in two steps and your petitioners will do likewise here.

The first step handled by the Court of Appeals was the question of whether the statements should be admissible at all.

Several Courts of Appeal have likened mail fraud cases to conspiracy cases, where the statements of one conspirator is admissible against the co-conspirator. *Rizzo v. United States,* 304, F. 2d 810, (8th Circuit).

The cases allowing the introduction of such hearsay evidence are in part as follows: *Friedman v. United States,* 347 F. 2d 697 (8th Cir., 1965), *Reistroffer v. United States,* 258 F. 2d 379 (8th Cir., 1958), cert denied, 361 U. S. 927, 79 S. Ct. 313, 13 L. ed. 2d 301, rehearing denied, 361 U. S. 856, 80 S. Ct. 42, 4 L. Ed. 2d 96 (1959).

I submit that the above rule is dangerous in that for the mere convenience of the prosecution, the courts

allow the most unreliable evidence, hearsay evidence, into the record against those accused of mail fraud.

This rule for admitting evidence of this nature is not the same as in conspiracy cases.

In the instant case, the hearsay evidence was not the alleged statements of alleged co-conspirators, or of co-defendants, but rather was the alleged statements of third parties, strangers to the lawsuit.

The admission of such patently unreliable evidence has always been frowned on by the Courts and this Court should exercise its supervisory power, to force a discontinuance of such practice.

The second matter handled by the Court of Appeals with reference to the hearsay evidence was the matter of order of proof. Here again the Eighth Circuit follows a rule of convenience to the prosecution, however I submit that this Court should rule on this matter because the Court of Appeals rendered a decision which is in conflict with the rulings of the Tenth Circuit in comparable situations.

The Court of Appeals for the Tenth Circuit in *Beck v. United States,* 305 F. 2d 595 (10th Cir.), cert denied 371 U. S. 890, 83 S. Ct. 186, 9 L. Ed. 2d 123 (1962), at page 600 stated:

> "It is agreed the general rule permits the admission of such statements, if they have been expressly or impliedly authorized, or have been ratified by the person against whom they are offered . . . The authority to render such statements admissible may be found in the circumstances of the particular case, in

the scope of the plan or scheme, or from other pertinent facts. *A proper foundation must always be laid.*" (Emphasis added.)

The Eighth Circuit follows a rather slip-shod approach laid down in *Reistroffer v. United States,* supra. In that case, also a mail fraud action, the trial court admitted evidence of salesmen's oral statements outside of the defendant's presence, subject to later proof connecting defendants with a scheme to defraud. A limiting instruction was given at the close of the evidence advising the jury to disregard the testimony unless they found by independent evidence that defendants devised or participated in a scheme to defraud.

The lead of the *Reistroffer v. United States,* supra, was followed in the instant case. The court gave the jury an instruction during the trial similar to the rule in *Reistroffer v. United States,* supra, and then at the close of evidence gave the jury instruction number 11, see Appendix E.

The jury sat through 44 witnesses testifying to hearsay statements and then received an instruction to disregard these statements, unless independent evidence was introduced to establish a scheme to defraud.

I submit that this is like locking the barn after the horse has been stolen.

This is a dangerous rule which allows the prosecution to introduce volumes of the most unreliable type of evidence, subject to later connecting up. Query, after listening to 44 witnesses who will be able to disregard this evidence based on an instruction of the Court.

I submit that the Court should exercise its supervisory powers over the lower courts to strike down this abusive and wholly unnecessary rule of evidence.

CONCLUSION

For the reasons above stated, the petitioners respectfully submit, that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 17,889

Frank J. Fabian,

Appellant,

vs.

United States of America,

Appellee.

No. 17,890

Joseph E. Fabian,

Appellant,

vs.

United States of America,

Appellee.

No. 17,891

Robert P. Szalay,

Appellant,

vs.

United States of America,

Appellee.

[March 28, 1966.]

Before MATTHES and GIBSON, Circuit Judges; LARSON, District Judge.

LARSON, District Judge.

These are appeals from convictions by a jury on 16 Counts of mail fraud, 18 U. S. C. § 1341. Counts 2, 3 and 14 of the 19 Count indictment were not submitted to the jury. The scheme upon which the convictions are based was the sale of stereo sets on a chain referral system in the Des Moines, Iowa, area. Appellants now seek reversal of their convictions, based on these contentions:

1. The jury should have been released following a prejudicial statement made by a member of the panel from which they were selected;
2. The trial court erred in admitting testimony of oral statements made by Concordia salesmen;
3. The Government's evidence was cumulative, repetitious, and provoked jury passion and prejudice;
4. Instruction Number 12 was erroneous; and
5. The lower court erred in denying appellants' motions for a directed verdict.

In the summer of 1962 appellant Frank Fabian, a 38 year old high school graduate, and his brother, appellant Joseph Fabian, a 27 year old college student, sold stereo sets for Concerto, Inc., in Omaha, Nebraska, on a part-time basis. Concerto used the referral system, described below, and the Fabians worked for commissions, usually receiving $50.00 per set. While vacationing in Omaha that summer appellant Robert Szalay, a 23 year old nephew

of the Fabians, accompanied them on sales demonstrations. During that period the Fabians discussed the possibility of forming their own business and their nephew, if not an active participant, was present during some discussions. Although Szalay returned to his home in Dearborn, Michigan, at the end of the summer, communications were maintained. In the early fall of 1962 the Fabians definitely determined to set up a sales program in another city similar to that used by Concerto in Omaha, and Robert Szalay decided to join the venture, contributing some capital. Additional funds were advanced by Joseph Fabian and a brother not involved in this case.

Appellants then established Concordia, Inc., as a Nebraska corporation. Frank was president; Joseph, vice president; and Robert Szalay was secretary-treasurer. On October 1, 1962, the corporation was authorized to do business in the State of Iowa. A sales tax permit was secured on November 28, 1962, and appellants posted a cash bond of $500.00. Office space was obtained in Des Moines under a one year lease, commencing September 22, 1962, and bank accounts in the name of Concordia, Inc., were opened with a Des Moines bank. Membership in the Credit Bureau of Des Moines was established in October of 1962. Arrangements were made to obtain stereo sets from Muntz T. V., Inc., of Illinois at a cost to appellants ranging from $98.00 to $149.00, depending upon the model and finish. However, most of the 65 sets purchased from Muntz were in the wholesale price range of $98.00 to $103.00, plus freight. Appellants contacted several finance companies and Consumers Finance Corporation finally agreed to purchase the Concordia sales contracts.

The method of marketing the sets in Des Moines was, in essence, a carbon copy of the Concerto sales plan in Omaha. Each stereo purchaser would receive an "Owner's Dividend Certificate" which provided that $15.00 would be paid for the name of each prospective customer (subject to credit qualifications), who agreed to a sales demonstration, regardless of whether a sale resulted. In addition, the prospective customer would receive $5.00 merely for listening to the sales presentation, which was not contingent upon the purchase of a set. Customers were informed that they could earn a set by referring twenty-six names, which could be submitted over a two year period. Most purchasers understood that there was no limit to the number of names they were allowed to refer, so that all referrals over twenty-six would result in profit. The referral plan was represented as a substitute for expensive advertising and a means of introducing the product to the community. Also, customers were told that the sets would later be sold through a retail outlet which appellants, or Concordia, planned to establish. Most customers understood that the referral plan had operated in other cities, such as Omaha and Lincoln, and many had the impression that these operations were quite successful.

The stereos were generally sold on an installment contract for $389.95, plus interest and carrying charges. These contracts were assigned to Consumer's Finance Corporation, which deducted a discount and paid the balance to Concordia. Purchasers were to make payments directly to the finance company, although some testified that they were not informed of this at the time they purchased the set, nor were they told about the interest and carrying charges added to the purchase price. With the addition of these

charges, the total price of the set was approximately $485.00.

Initially appellants demonstrated the stereos, but they soon hired several salesmen, a number of whom were stereo purchasers who worked only part time. Among the salesmen was Don Knight, who had previously sold for Concerto in Omaha during the same interval that the Fabians were connected with that organization. Subsequent thereto, but before going to Des Moines, he took over a referral program involving Muntz stereos in Lincoln, Nebraska. That business was unable to honor the referrals and in mid-November, 1962, Knight came to Des Moines and was hired as a salesman for Concordia, receiving a commission of $60.00 a set, which was $10 more than the other salesmen received.

About the same time Muntz T. V. informed appellants that they would no longer sell stereos to Concordia. The Muntz sales manager indicated that this action was taken because the product was being sold in connection with a "gimmick" and because the price was exorbitant. He testified that the retail value of the stereos was $200.00. In addition, the Muntz representative informed the Fabians that a referral plan in Lincoln, with whom Muntz had been doing business, received adverse publicity which caused the company to become concerned about appellants' operation in Des Moines. The last set which Muntz sold to appellants was on November 20, 1962. Thereafter, Concordia obtained the same Muntz model from other sources, the majority at a wholesale cost higher than the Muntz price.

In December, 1962, Concordia began receiving complaints that appointments were not kept with the referrals. The office girl informed the callers that Concordia had at-

tempted to contact them to reschedule some of these appointments since they had more than they could cope with, and that the salesmen were having difficulties in making all of the calls because of the severe weather. Complaints were also received concerning the $15.00 referral payments and customers were informed that there were so many to complete that it was impossible to adhere to the payment schedule. They were also told that the person with authority to sign checks was out of town. In addition to the complaints directed to Concordia, complaints were lodged with the Better Business Bureau. Shortly after appellants arrived in Des Moines, they had contacted the Bureau, leaving a phone number and address. After receiving a number of complaints, some beginning in the fall of 1962, a Bureau representative held a conference with the Fabians on January 16, 1963, and was promised complete cooperation in eliminating the problems. About a month later, on February 25, 1963, the business was abandoned, although no arrangements had been made concerning demonstration appointments and referral payments. Frank Fabian returned to Omaha; Joseph Fabian had already left in the latter part of January to resume his college work; Robert Szalay, after cleaning out the office, subsequently went back to Michigan.

Jury Prejudice—

During selection of the jury a member of the panel made a statement to the effect that as a juror in another mail fraud case he suggested that defendant be found guilty so the jury could watch the World Series.[1] Thereafter, counsel for both sides conferred with the trial judge in

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1 Counsel advise us that the 1964 World Series was being played at the time of the trial in this case.

chambers and it was determined that appellants would be granted an additional peremptory challenge. When this juror was called, the trial judge excused him for cause. However, it is now suggested that the court should have dismissed the entire panel for cause or should have taken evidence to determine exactly what the prospective juror said and whether or not other members of the panel heard the statement.

"The right to challenge the panel or to challenge a particular juror may be waived, and in fact is waived by failure to seasonably object." *Batsell v. United States*, 217 F. 2d 257 (8th Cir. 1954). In our opinion, that right was waived here. Appellants concede that no objection was made to the course followed by the trial judge. If dissatisfied with that procedure, the objection could have been noted. Appellants neither moved for a mistrial,[2] nor did they present a motion to dismiss the panel. On voir dire, the panel might have been examined about the incident and, if appropriate, individual members might have been challenged for cause. None of these alternatives was chosen. Although there *may have* been prejudice here, appellants would have us reverse the convictions and remand for a new trial on the assumption that the jury *actually was* so prejudiced that a fair trial was impossible. But the rule is otherwise—jury prejudice cannot be presumed, and appellants have the burden of showing its existence. *Beck v. Washington*, 369 U. S. 541, 558, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962). It rested with appellants to request a hearing and

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2 Affidavits of trial counsel for the Government and for appellants are conflicting as to whether the trial judge suggested, or offered, appellants a mistrial.

produce evidence to determine which jurors heard the statement and the effect it might have had. Cf. *Frazier v. United States,* 335 U. S. 497, 69 S. Ct. 201, 93 L. Ed. 187 (1948); *United States v. Gordon,* 253 F. 2d 177, 184 (7th Cir. 1958). This was not done here, and we are satisfied that the remedy provided by the court was adequate, in the absence of any objection by appellants.

Salesmen's Statements—

Appellants contend that admission of testimony concerning oral representations by Concordia salesmen was improper because (a) the record contains no evidence of a scheme to defraud; and (b) no proper foundation was laid for such testimony. The first argument is based on the rule that salesmen's oral statements, out of appellants' presence, would not be binding on them unless there was independent evidence of a scheme to defraud in which appellants participated. *Friedman v. United States,* 347 F. 2d 697 (8th Cir. 1965); *Reistroffer v. United States,* 258 F. 2d 379 (8th Cir. 1958), *cert. denied,* 358 U. S. 927, 79 S. Ct. 313, 13 L. Ed. 2d 301, *rehearing denied,* 361 U. S. 856, 80 S. Ct. 42, 4 L. Ed. 2d 96 (1959); *Schaefer v. United States,* 265 F. 2d 750 (8th Cir. 1959), *cert. denied,* 361 U. S. 844, 80 S. Ct. 97, 4 L. Ed. 2d 82 (1959). Disregarding the challenged testimony—as we must for purposes of determining its admissibility—the record warrants the conclusion that appellants did formulate and participate in a scheme, which was advanced by the oral statements of Concordia salesmen. It was appellants who determined to introduce the referral program to Des Moines; it was they who adopted and adapted the Concerto "Owner's Dividend Certificate" for use by Concordia. Their active participation in the plan is evi-

denced by the efforts to obtain stereo sets and their actual demonstration and sale of the sets. That the salesmen were essential in furthering the plan is shown by the training sessions conducted by appellants. Moreover, the testimony of appellants themselves demonstrates substantial consistency between the oral representations of salesmen and the instructions they received.[3] From this independent evidence, and considering the record in its entirety, it must be concluded that the testimony objected to was admissible, and binding upon appellants.

The second phase of the challenge to this evidence relates to the order of proof. The argument is that the statements were admitted at a point when no foundation evidence had been adduced to connect appellants with a scheme to defraud. The contention that this showing was necessary *before* the testimony was admitted is answered by *Reistroffer v. United States, supra. In that case, also a mail fraud action, the trial court admitted evidence of salesmen's oral statements outside the defendants' presence, subject to later proof connecting defendants with a scheme to defraud. A limiting instruction was given at the close of the evidence advising the jury to disregard this testimony unless they found by independent evidence that defendants had devised or participated in a scheme to defraud.* We approved that procedure, noting that the record did contain such independent evidence. The trial court here adopted a similar procedure, giving a cautionary instruction after an objection was interposed. Although appellants' trial counsel indicated approval of the instruction, it is now con-

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3 Appellants testified that they gave no instructions to Don Knight or Frank Fisher, both of whom had worked for the Concerto organization in Omaha and Lincoln. It was assumed by appellants that these salesmen were familiar with the set and the referral plan.

tended that no proper foundation was laid, relying on the following language in *Beck v. United States,* 305 F. 2d 595 (10th Cir.), *cert. denied,* 371 U. S. 890, 83 S. Ct. 186, 9 L. Ed. 2d 123 (1962).

> "It is agreed the general rule permits the admission of such statements, if they have been expressly or impliedly authorized, or have been ratified by the person against whom they are offered . . . . The authority to render such statements admissible may be found in the circumstances of the particular case, in the scope of the plan or scheme or from other pertinent facts. *A proper foundation must always be laid.*" 305 F. 2d at 600. (Emphasis added.)

Appellants apparently read the italicized language to mean that the foundation must be laid before the testimony is admitted. Our decision in *Reistroffer* indicates the contrary and that decision was relied upon in *Beck* and recently quoted with approval in *Friedmdn v. United States, supra,* 347 F. 2d at 708. The foundation may be laid, and the testimony rendered admissible, by subsequent proof. If that later proof shows, as it did here, that the defendants against whom the evidence is offered, did formulate and participate in a scheme to defraud, and the salesmen's statements were in furtherance of that scheme, then a proper foundation has been laid. The problem here is *not unlike* that which arises in conspiracy cases in which the declarations of an alleged conspirator are offered against an alleged co-conspirator, who was not present when the statements were uttered. In that type of case we have held it to be discretionary with the trial judge whether to admit the evidence subject to later proof of the existence of a conspiracy. See *Rizzo v. United States,* 304 F. 2d 810 (8th Cir.), *cert. denied,* 371 U. S. 890, 83 S. Ct. 188, 9 L. Ed. 2d 123 (1962); *Cwach v. United*

States, 212 F. 2d 520 (8th Cir. 1954). The order of proof rests largely in the discretion of the *trial judge* and we cannot say this discretion has been abused here.

Cumulative Evidence—

Appellants complain that forty-four stereo purchasers were called as witnesses by the Government. They contend that the testimony was repetitious and by pure volume served to prejudice and impassion the jury. It is argued that actual passion and prejudice can be found in the fact that the jury reached a verdict in less than one hour.

The Government had the burden of showing a scheme to defraud and "a scheme" involves some connotation of planning and pattern . . . . *United States v. Ross,* 321 F. 2d 61, 68 (2d Cir.), *cert. denied,* 375 U. S. 894, 84 S. Ct. 170, 11 L. Ed. 2d 123 (1963). To demonstrate this pattern it may perhaps be necessary to call more witnesses than would be required in other types of cases. *It is within the discretion of the trial judge to regulate the course of trial, and the record here does not suggest that this discretion was abused.* Moreover, there is no indication that appellants objected to the Government's evidence as being repetitious and cumulative.

The contention that a verdict reached within one hour must be based on jury prejudice, attributable to the number of witnesses, is untenable. A similar argument was advanced, and rejected, in *Greenhill v. United States,* 298 F. 2d 405 (5th Cir. 1962), *cert. denied,* 372 U. S. 968, 83 S. Ct. 1092, 10 L. Ed. 2d 130, *rehearing denied,* 373 U. S. 947, 83 S. Ct. 1536, 10 L. Ed. 2d 703 (1963), in which the jury returned a verdict within one hour on nine counts of mail

fraud and ten counts of fraud in the sale of securities. The scheme involved in the instant case was not particularly complex, and *we cannot "assume" that the jury failed to consider all of the testimony and exhibits.*

Instruction Number 12—

In this instruction the Court mentioned evidence concerning the alleged participation of appellants Fabian in the Concerto operations in Omaha and Lincoln, Nebraska.[4] The Fabians take exception to this charge on the ground that there was no evidence that they ever worked in Lincoln or had any connection with that organization. While the record does contain several references to Lincoln, there is no indication that the Fabians actually participated in, or had any interest in, the sales program conducted there. *Nonetheless, in the context of the entire trial, we think the instruction was harmless.* It was clear in its admonition that evidence about the referral plan in Lincoln should be considered solely in relation to the knowledge, intent, or purpose of appellants Fabian. The record does show that the Fabians were at least aware of the existence of this operation, and it might have been inferred that they also knew of its downfall. The jury was entitled to consider the

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4 The last paragraph of Instruction No. 12, which is the focus of the objection, reads as follows:

> The government presented evidence as to alleged transactions participated in by the defendants, Frank J. Fabian and Joseph E. Fabian, which occurred in the Omaha and Lincoln, Nebraska areas in connection with an organization known as Concerto, Inc. You may consider such evidence for whatever bearing, if any, it may have as to the knowledge, intent, or purpose of each of these two said defendants in the matters charged in the indictment. You may not consider, however, that such evidence is proof of the crimes charged in the indictment. Such evidence was received and may be considered by you for the limited purpose of bearing on the question of intent of each of these two said defendants to commit the crimes charged in the indictment.

bearing this knowledge had on their purpose and intent. As so limited, Instruction Number 12 was proper.

Motions for Directed Verdict—

Upon completion of the Government's case in chief, appellants moved for a dismissal and directed verdict. The motion was overruled, but was renewed at the close of all the evidence, and was again denied. Viewing the evidence as insufficient to sustain their convictions, appellants find error in these rulings.

The components of an offense under the mail fraud statute are: (1) the existence of a scheme, or the making of false representations and promises, (2) for the purpose of obtaining money or for defrauding, (3) furthered by the use of the mails. *Gold v. United States,* 350 F. 2d 953 (8th Cir. 1965); *Beck v. United States, supra.* No question is presented here as to the use of the mails.[5] Turning, then, to the first element, it is apparent that a scheme—i.e., a plan and a pattern—did exist. Appellants themselves testified that before leaving Omaha for Des Moines they discussed the method of selling and calculated anticipated expenses and profits. Thus they arrived in Des Moines with a plan and they proceeded in accordance thereto. That the referral sales of stereo sets was not on an isolated, ad hoc, basis, but constituted a pattern is indicated by the virtually identical testimony of many purchasers.

Among the representations made by appellants and the salesmen, claimed to be false by the Government, were (a)

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5 Referral payments were sent through the mail and some purchasers received letters extending a "welcome" into the Concordia "family" of stereo purchasers.

that the stereo had a diamond needle, (b) that only twenty-six referrals were necessary to earn the set, and (c) that this method of selling had operated successfully in other cities. The evidence shows that, in fact, the needle was sapphire and not diamond. The record also shows that in fact more than twenty-six referrals were necessary to completely pay for a set. The representation concerning successful operations in other cities also was false, at least insofar as Lincoln, Nebraska. Other false or misleading representations include the failure to inform some purchasers that interest and carrying charges would be added to the purchase price and that the installment contracts would be assigned to Consumers Finance. In addition, we have the contrived explanations concerning non-receipt of referral payments.

The crucial element, from appellants' standpoint, is the second one—purpose or intent to defraud. The crux of the defense was that they acted in complete good faith, and through inexperience they innocently, but mistakenly, thought the referral plan could succeed. The false representations, described above, constitute one basis from which the Government derives fraudulent intent, but the principal reliance is on the patent impossibility of the scheme, which, it is argued, should have been perfectly obvious to persons of appellants' age, education, and background.

On the other hand, appellants point out that they began by obtaining authority to do business in Iowa; applying for a sales tax permit and posting a bond; and registering with the Better Business Bureau. We also sought advice of attorney in forming corporation and operation of same, Lyle Strom. With reference to the misrepresentation about the

diamond needle, they explain that it was so small that it was impossible for anyone to ascertain that it was not diamond, and that after reading a Muntz brochure about the set and learning that the needle was sapphire, customers were so informed in record; also salesmen were specifically directed not to use diamond needle after we discovered this. Appellants showed that twenty-six referrals at $15.00 each would cover the price of the set, exclusive of interest and carrying charges. They also point out that a few purchasers received enough referral payments to completely earn their sets, and others even made a profit. Appellants maintain that they were not aware that difficulties of the Concerto organization in Lincoln were caused by the inability to make referral payments. Appellants were convinced, or so they testified, that the referral plan would be successful. A $600.00 personal loan obtained by Joe Fabian is cited as evidence that appellants attempted to honor their commitments under the referral program. There was also testimony tending to show appellants intended to use this method of selling as a short term, introductory approach, preliminary to opening a retail establishment.[6]

From the foregoing summary, it seems clear there was evidence from which the jury *might infer* the existence of fraudulent intent, *as well as the lack thereof. It is not our province to choose between conflicting evidence, or to determine the inferences which should be drawn therefrom.*

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6 The referral plan cannot succeed even if used for only a short time unless at some point customers subsequent to the first one are not allowed to earn the set. As the Government brought out at the trial, once the plan is set in motion, the referrals spiral due to the principle of geometric progression. If each person who purchases a set can earn it by referring names, no profit will be made; hence, no funds would be available to satisfy referral commitments. The only method of halting the progression is to withhold the referral privilege for customers who were obtained by referral.

What was said in *Beck v. United States, supra,* is pertinent here:

> "Fraud or the existence of a fraudulent scheme is seldom susceptible to proof *solely by direct evidence and in nearly every such case, direct and circumstantial evidence together with the inferences to be drawn therefrom must be relied upon for proof.* On the face of the business operation involved here, it may be argued that it was merely a legitimate business venture that did not work out successfully. That, however, was a question of fact, to be determined by the jury after considering all of the evidence and the inferences to be drawn therefrom." 305 F. 2d at 598.

Here the jury resolved the conflict between the circumstances tending to show intent to defraud and that tending to show good faith, in favor of the former. We must assess the evidence in a light most favorable to upholding the jury's verdict, and resolve all reasonable inferences in favor of the Government. *Friedman v. United States,* 347 F. 2d 697 (8th Cir. 1965); *Koolish v. United States,* 340 F. 2d 513 (8th Cir. 1965). Judged from this view, we cannot say, as a matter of law, that the evidence does not support the verdict. Accordingly, we find that the trial court did not err in overruling the motions for a directed verdict.

Upon reviewing the record, with appellants' arguments in mind, we conclude that they received a fair trial, free from reversible error. The judgments of conviction must be affirmed.[7]

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7 Frank and Joseph Fabian were sentenced to three years imprisonment on all counts—except Count 19—the sentences to run concurrently. However, it was recommended that these appellants be eligible for parole after six months. As to Count 19, they were placed on probation for three years, said sentence to run consecutively with that imposed on the other counts. Appellant Robert Szalay was given a suspended sentence under the Youth Correction Act and placed on probation for three years. A condition of probation for each appellant was payment of one-third of the costs. Although we affirm the convictions, we concur in the recommendation for early parole.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

AMENDMENT V

CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX C

AMENDMENT VI

CONSTITUTION OF THE UNITED STATES

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have

been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to have the Assistance of Counsel for his defense.

APPENDIX D

18 U. S. CODE 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1000 or imprisoned not more than five years, or both. June 25, 1948, C. 645, 62 Stat. 763; May 24, 1949, C. 139, § 34, 63 Stat. 94.

APPENDIX E

INSTRUCTION 11

In the present case the government has presented evidence as to statements made in the absence of the different defendants. Before you may consider such evidence as to any defendant, you must first find that the government has by evidence apart from such statements established beyond a reasonable doubt (1) that the particular defendant and the person or persons making the statement or statements had knowingly and intentionally participated in devising the scheme described in the indictment, and (2) that the statement or statements were made pursuant to such scheme and in furtherance thereof.

If the government as to a particular defendant has so established both (1) and (2), you may consider such evidence in passing upon the guilt of such defendant and give it such weight as you feel it is justly entitled to.

If the government has not so established both (1) and (2), then you should reject such evidence and give it no consideration in passing upon the guilt of such defendant.

The foregoing instruction relates only to evidence as to statements made in the absence of a particular defendant. It does not relate to evidence as to statements made by such defendant or in his presence. Evidence as to the statements made by a particular defendant or in his presence may be considered by you in passing upon the guilt of such defendant even though the government has not established (1) and (2) above set forth beyond a reasonable doubt.